CLEVELAND ACADEMY OF TRIAL ATTORNEYS

November 1999 Newsletter
Edited by Paul V Wolf and Romney B. Cullers

PRESIDENT'S MESSAGE

By Robert F. Linton, Jr.

Homeowners' Policies – Hidden UM/UIM Coverage. Your client's homeowner's policy may be a new source of potential uninsured/underinsured auto coverage. This is based on a series of recent, unreported cases from the 5'' and 10'' Appellate Districts. While most homeowners' policies contain a motor vehicle exclusion, they also contain an exception to that exclusion for recreational vehicles. Applying well-accepted principles of insurance contract interpretation, these courts hold that recreational vehicles constitute motor vehicles, and, therefore, such policies must offer UM/UIM coverage. Without an express rejection of such coverage, UM/UIM coverage arises by operation of law in the same amount as liability limits. See *Auto Mutual Ins. Co. v. Lopez* (10th App. Dist. 9/23/99) No. 99 AP-15, unreported; *Stewart v. State Auto Mutual Ins. Co.* (10th App. Dist. 10/7/99) No. 98-AP-1601, unreported; *Chuff v. Holland* (5'' App. Dist. 9/30/99) No. 99CA57, unreported; *Willis v. Lightning Rod Mutual Ins. Co.* (5'' App. Dist. 9/27/99) No. 99CA14, unreported; *German v. Wray* (5'' App. Dist. 9/3/99) No. 99CA17, unreported. Many of these policies do not contain a two-year statute of limitations provision, and, therefore, should be governed by the 15 year statute of limitations for written contracts.

Admissibility of Policy Limits in Trial of UM/UIM Claim. Unlike most personal injury claims, a UM/UIM claim is based on contract. As such, the entire contract should be admissible in the trial of a UM/UIM claim. This includes the amount of the policy limits the parties bargained for. Judge McAllister recently ruled that way in *Gerzanics v. Nationwide Mutual Ins. Co., et al,* Cuyahoga County Common Pleas Court Case No. 366345. Many thanks to fellow board member, Dale Economus, for providing this trial pointer, which he used in Judge McAllister's room.

Defeating Subrogation Claims. Two recent cases provide additional ammunition to use against medical subrogation claimants when your clients have not yet been made whole. In *Copeland Oaks v. Hupt,* (March 25, 1999) Northern District of Ohio - Eastern Division, Case No. 4:CV-780, our local district court held that under 6th

Circuit law, the make whole rule defeats an ERISA Plan's subrogation interest where the injured party has not been fully compensated. In *Porter v. Tabern*, (2nd App. Dist. Sept. 17, 1999), Case No. 98-CA-26, unreported, the second appellate district followed the first and second Ohio appellate districts and adopted the make whole rule as well. Copies of those decisions are attached.

Practice Tips. Hats off to Romney Cullers and Paul Wolf for their continued efforts to improve our Newsletter. You'll note this month's Newsletter contains two articles of interest. The first -- *Tying the Auto Case* -- is by one of our new board members, Mitch Weisman. Mitch, who has tried more than fifty auto cases, provides an excellent refresher course on the nuts and bolts of handling these types of cases.

In addition, Michael L. Robertson, a questioned document examiner, has prepared an article on how to look for altered records. Be sure to check out his article *Documents: Authentic or Spurious?* to learn how to uncover these smoking guns, which can make or break a case, and give rise to a separate claim for punitive damages. See *Moskovitz v. Mt. Sinai Hospital (1994)* 69 Ohio St.3d 683; *Dimora v. Cleveland Clinic Foundation* (Cuy. Cty. 1996) 114 Ohio App.3d 711 (punitive damages properly awarded where nursing notes inaccurately and improperly reported incident).

No-Dinner Dinner Dance. The CATA again co-sponsored the 13th Annual No-Dinner Dinner Dance, which was held on November 20, 1999. Proceeds go to help eradicate hunger in Greater Cleveland. We would like to thank the members of the judiciary who attended this important event.

Luncheon Seminars. Secretary, David Paris, has slated an excellent seminar to take place on Friday, December 10, 1999 at 1:00 p.m. Debra Dixon and Federal District Judge Kathleen O'Malley will provide a sneak preview of *Courtroom Technology for the Future.* The seminar will take place in Judge O'Malley's courtroom, one of the most technologically advanced in the country. Debra Dixon will demonstrate how to use that technology based on a products liability case she recently tried there. Please note that this seminar will be a "No-Lunch" luncheon seminar and will begin at 1:00 p.m., since food and drinks are not permitted in the courtroom. David's November seminar, *Stupid Mistakes Made By Plaintiffs' Counsel,* was well attended. The Academy would like to thank Judge Thomas pokorny for his insight and contribution.

New Members. Please join in welcoming our new members to the Cleveland Academy of Trial Attorneys: Michael A. Saltzer, Phillip A. Ciano, John Paul Oreh, Martin S. Delahunty, Len W. Stauffenger, Alan H. Kraus, and Thomas H. Terry III.

Future Projects. Your Academy Board members continue to work to improve the services we offer to our members. We are presently updating our computerized index to the thousands of expert depositions contained in our bank. We are also working to enhance our reputation with the public and community by exploring an association with Youth Challenge. This is a non-profit organization which provides recreational and social activities for disabled children. As advocates for the injured and severely disabled, we would like to become actively involved with this worthwhile organization.

We are also exploring expanding our membership to new lawyers and offering a mentoring program for those who may need assistance from more seasoned trial attorneys. If the Academy can further assist you in any way, please let me know. Remember, in the race for justice, there is no finish line.

TRYING THE AUTO CASE

By Mitch Weisman

The purpose of this article is to highlight some practical tips that I have found to be helpful in trying the auto case.

Use of Exhibits in Openina Statement

The police report diagram can be blown up and used in opening statement. A diagram may not only help to persuade with respect to liability but it may also help to prove the nature and extent of the impact. It also aligns the plaintiff with the police officer. When I use the police diagram in opening statement, I place it in front of the jury and begin to use it to the surprise of defense counsel. The Court should allow its use. Ifopposing counsel objects, the jury is looking at the diagram as the objection is being made. The reference has already been made to the fact that it was done by the police officer. So opposing counsel appears to be interfering with the jury's understanding of the police diagram. This should create a negative impression of opposing counsel. Only the diagram should be blown up. Any other part of the police report will give opposing counsel a proper basis to object.

If a damage chart is going to be used in closing argument, it can also be used in opening statement. I often use the chart to simply outline the damages that the jury should be considering while hearing the evidence. This is particularly effective in a case of admitted liability since the only issue for the jury is the nature and extent of the damages. Blow-ups of photographs also may be used in opening statement (depending on the Court) to show something of particular importance such as the severity of the impact or the extent of the injury.

Photographs

Photographs should be taken of the plaintiff's injuries as well as the vehicles involved in the collision. Photographs of the scene and the roadway may also be important depending upon the case. Photographs taken at the scene soon after the collision may be very helpful and even necessary for an accident reconstruction expert to make calculations such as the speed of the vehicles. Remember, insurance companies typically take photographs. You should try to obtain those as well.

Rear-End Collisions

The rear bumpers on newer cars show much less damage than they showed years ago. The bumpers are being made differently and better. One accident reconstruction expert explained to me that if possible, photographs should be taken with the rear bumper removed. The cost will probably be less than $100.00 for the repair shop to remove the bumper and then put it back on. Photographs taken of the back of the car with the bumper removed will show the extent to which the material under the bumper has been compressed. This type of information will be helpful to a reconstruction expert.

A study was done by a number of accident reconstruction experts down in Texas which concluded that the greatest risks to a person who is rear-ended in an automobile collision are age (over 40) and position. In other words, the more the spine has degenerated over time, the more vulnerable the spine is to a 'whiplash" type of movement.

The other significant risk is the position of the person as he is hit. In other words, *if* your client is turned because he is talking to somebody or looking to turn or is not straight for some other reason, the spine is much more vulnerable to injury. Therefore, the position of the plaints should be determined when taking the facts from the plaints. This information

can be given to an accident reconstruction expert if one is used. This information should also be given to the treating physician who can comment as well. An orthopedic surgeon or any other specialist should certainly understand this concept. Also, the plaintiff should be reminded to explain the fact that he was twisted at the time of impact when he is deposed and when he gives a history to any examining doctor including the defense doctor.

Accident Reconstruction Experts

Use of an accident reconstruction expert should be considered. As an example, a case comes to mind involving a little boy on a bicycle who was hit by a car. The conclusion of the Shaker Heights Police report was that the boy violated the red light. However, the Shaker Heights Police did a very excellent and thorough report similar to one that would be done by the State Highway Patrol.

An accident reconstruction expert was hued. Based upon the various measurements made by the police and other evidence, the accident reconstruction expert was able to demonstrate that the car was exceeding the speed limit by 15 to 20 miles per hour. Thus, the insurance company acknowledged liability and compensated the boy.

Lay Witnesses

Lay witnesses may be needed not only to prove liability but also to prove damages. There are a number of benefits to using lay witnesses. First, opposing counsel typicaily do not depose lay witnesses. Thus, there is often an element of surprise at trial. You should have seen the look on the defense counsel's face when one of my lay witnesses explained that she was a nun.

Further, lay witnesses spend a lot more time with an injured plaintiff than any doctor would for obvious reasons. **A** doctor only examines the plaintiff periodically. **A** lay witness may observe the plaintiff many times per week. Consider using neighbors, relatives, co-workers, clergy, etc. as witnesses in your case. The lay witness may have an obvious bias such as the *case* with a close friend or a relative. **But** you may be able to find a lay witness such as a co-worker who does not have a close personal relationship with the plaintiff and thus has great credibility.

One example comes to mind. **I** represented a woman who had soft tissue injuries. The case involved a claim of chronic pain. Unfortunately, her treating orthopedic surgeon totally deserted her by canceling the deposition at the last moment because he had to go out of town. The only medical testimony we had was of a neurosurgeon who consulted one time.

The lay witness was a co-worker who was about 20 years old. The plaintiff was about 45 years old. It was clear that the plaintiff and the lay witness were not social friends but simply people that spent time together in a work environment. The lay witness was very credible and she was able to explain to the **jury** that the plaintiff never had any physical problems before the collision and that after the collision the plaintiff required physical assistance with her work. She also observed the plaintiff taking pain medication from time to time. In my opinion, the lay testimony was better than any medical testimony that could have been presented in the case.

The Police Officer

Even when liability is admitted, it can be very persuasive to use the police officer. The police officer can testify as to facts observed as well as statements and admissions made by the drivers. The typical police report will include observations by the police officer as to the nature and extent of the property damage to the vehicles. The police officer will also note the speed at the time of impact.

The most important testimony from a police officer

may be what is not contained in the report. Often times, the opposing party will create some theory of liability after the police report is made. At deposition, the opposing party should be asked if the police officer was cooperative and courteous and gave the opposing party ample opportunity to explain what happened. I have never had the opposing party state at deposition that the police officer did not allow the party to give a statement and explain what occurred. If the opposing party does make a complaint about the police officer, that will sound like sour grapes.

The point is that if the opposing party did not state to the police officer whatever he is later trying to claim, the opposing party will not be believed by the jury. He would have been expected to bring up all key points *to* the police officer at the scene of the collision. While there are facts contained in the police report which may be helpful to your case, it is also good for the ***tone*** of the case to call the police officer as *your* witness.

The Paramedic

When a client is taken by ambulance to the emergency room, the ambulance run report should be obtained. There is typically a charge for the service so the bill should be obtained as well. Important information is contained in the EMS report. The paramedic takes a history and notes observable signs of injury. The report can be very useful but it is not admissible. Sometimes the report is included in the emergency room record so a Court *may* permit it to come into evidence as part of the hospital record. But if there is anything in the report that is important to the *case,* the paramedic should be called as a witness.

Statements

If you are retained soon after the collision occurs, statements should be taken of all eye witnesses. Hopefully, the witnesses will cooperate and give you a signed statement. There is a booklet called *Attorney Aids* which contains very helpful suggestion as to how to take a good statement. Feel free to call me *if* you would like a copy.

Insurance companies very often will take a statement from your client before they are notified that your client is represented by an attorney. Likewise, until there is verification that the opposing party is insured, there is no reason why you cannot take a statement from the other driver.

You may also take a statement from passengers in the 'other" car. One of the first cases that I ever tried involved a red light/green light dispute. The passenger in the other car "accused" my client of going through a yellow light. He gave me a signed and dated statement saying that my client went through a yellow light while proceeding straight through the intersection. The witness did not realize that he was helping me and I ended up calling him as my witness at the trial.

More Than One Collision

Your client may come to you with a history of being involved in more than one collision or while you are handling his case, he may be involved in a second collision. I am now representing a young man who was involved in four collisions in approximately ten months. You will want to keep in mind the case of *Pang v. Minch* (1990) 53 IS 3d **186,** 559 N.E. 2d 1313. This case can be very helpful and also very confusing depending on the facts of your case. In essence, the Ohio Supreme Court indicates in *Pang* that if you have medical testimony to show that there are two or more causes of a single indivisible injury, then each cause is responsible for the injury. The burden shifts to the defendant to prove he was not responsible for the injury.

The practical point is that you will want to join all possible responsible parties in your lawsuit so that you do not have a problem at trial with a particular

defendant pointing to the 'empty chair". In other words, if you do not bring in a defendant who may be responsible for some or all of your client's injuries, then the defendant who is at trial will inevitably blame the party who has not been named in the lawsuit.

SR-1 Report

The Bureau of Motor Vehicles requires that a person involved in an automobile collision fill out an SR-1 report. The drivers don't always comply with this request but you will want to check with the Bureau of Motor Vehicles in Columbus as to whether or not reports have been filed. If the opposing party has filed a report, there may be helpful admissions against interest. If your client has filed such a report, you will want to know what your client stated. If you are retained soon after the collision, you will want to guide your client as to what should be said in the report.

Bureau of Motor Vehicles

The driving record of the opposing party is available by writing to the Bureau of Motor Vehicles in Columbus. The report shows all driving violations and suspensions for the previous three years. The driving record may be important with respect to a number of issues including a possible claim of negligent entrustment of the defendant's vehicle.

Weather Report

Weather information may be important in your case and it is kept in great detail for any time period for which you may be concerned. The information can be obtained through a number of sources including Cleveland Hopkins International Airport or by writing to the National Weather Service in Asheville, N.C.

Insurance Coverage

In automobile cases, there can be a problem with collectability. All insurance coverages should be looked into such as coverages of your client and any person with whom your client lives. Insurance policies typically cover people (and especially relatives) living in the same household with respect to uninsured motorist and underinsured motorist coverages.

A very interesting uninsured/underinsured motorist case was just decided by the Ohio Supreme Court. It states that a person is covered by his employer's insurance coverage even if the collision occurred outside of the course and scope of employment. Of course, the policy must be checked for exclusions. This is the case of *Scott-Pontzer v. Liberty Mutual Fire Insurance Company,* **85** Ohio St. 3d **660; 710** N.E. 2d **1116** (June **23,** 1999). Be careful to investigate all insurance coverage which may apply.

Drunk Defendants

The case of *Cabe v. Lunich* (1**994) 70** Ohio St. 3d 598 should be kept in mind. The law used to be that intoxication in and of itself would not give rise to punitive damages in an automobile collision case. The Ohio Supreme Court changed that position in *Cabe.* You are now entitled to an instruction of law that the jury may consider punitive damages when drunk driving is involved.

The Family Doctor as Fact Witness

We typically concentrate on the treating physician when developing medical testimony for trial. However, the defense often points to other possible causes for the plaintiffs symptoms. An excellent way to combat this defense is by using the family doctor as a fact witness. The family doctor can exclude certain medical theories of the defense as they relate to the plaintiff's health before the collision. Further, a narrative report is not required

if *opinions* are not asked of the doctor. The doctor *can* simply be used as a fact witness. The doctor can review his records from before the collision to verify what medical problems the plaintiff had or did not have.

This can be very important especially when the defense is claiming some type of long term degenerative problem. The family doctor can point out that the the plaintiff never had any problems similar to those claimed in that the lawsuit. While you can probably use that the office records of that the family physician, it is more effective to have that the doctor actually testify as to what his records indicate.

These were a few practical tips that came to mind. Thank you to the CATA for allowing me to share these thoughts with you.

DOCUMENTS: AUTHENTIC OR SPURIOUS?

By Michael L. Robertson

This brief article serves as a reminder that almost any document *can* be forged or altered to better suit the needs or intentions of an interested party. As an attorney, you are in a good position to keep a watchful eye for questioned documents. Depending on the case at hand, determining a document to be genuine or not, may benefit your client. If the fmdings are detrimental to your case, it is better - sooner than later - to find out.

Here are some items to consider when the authenticity of a document is in question:

Freehand forgery refers to a forged writing (frequently a signature) that was executed by the forger in a free style method. The writer may have had access to the legitimate signature and practiced the forgery before executing the questioned document. Except in rare instances, (1) the individual characteristics of the writer will be seen in the forged writing or, at least, (2) the execution will reflect the writing was not done by the victim of the forgery.

Traced forgery, as the term implies, is a common method of executing a forgery. Often, the forger will place a genuine (model) signature on a window pane so adequate light is transmitted through the paper. The document to be forged is placed on top of the model signature. The forger then traces the model signature onto blank document. The result is a signature that is pictorially similar to the genuine signature. Two tell-tale signs of a traced forgery are blunt beginning/ending strokes and a lack of changing pen pressure on up and down strokes.

Fraudulent photocopy reoroductions are frequently produced by the cut and paste method. Portions of one document are cut and pasted to another document, i.e. a genuine signature from one document is pasted to a spurious document. You may see a shadow around the signature, caused by the photocopy process, or a portion of a base (writing) line from the genuine document that does not belong on the reproduced forgery. If one of the documents has been copied more than the other document used in the cut and paste, an examiner may determine the proportional sues of the typed characters are different. Invariably in a cut and paste, when you ask for the original document, the "original" document has been lost or destroyed.

Obliterations and erasures of integral data should draw your attention and require resolution. In many cases special lighting, such as ultraviolet or infrared, are needed to examine the original obliterated or erased data. If you have an original document where correction fluid was applied to an entry, place the document in a copier, face up, set the machine for dark printing and make a copy. Often times the data

beneath the correction fluid will show up on the copy.

Injury/illness/age/alcohol/drugs are conditions that can affect a person's writing. There are too many factors to discuss here, but it is important to keep in mind these conditions do not preclude the identification of an author. For instance, a wily relative may forge an aged relative's signature attempting to make it look "shaky" and similar to the genuine signature. This type of deceptive writing may leave tell-tale signs of fakery. Deathbed signatures, or those made after the sudden onset of a debilitating illness, are usually made under the most dire circumstances and may be difficult to compare to known signatures executed before the illness occurred.

A document examiner may be able to help you in additional areas such as examination of staple holes, paper folds, indentations, inks, paper and scanned documents. In many cases, an attorney will ask me to conduct a general, non-specific, examination of a document(s) to determine if anything out of the ordinary is observed. One case of interest involved an original multiple page document. The examination of the paper, typing, format, signatures etc. did not reveal anything unusual. When the pages were examined on the light table, one of the inside pages was found to have one less set of staple holes than the rest of the pages indicating a possible substitution. I mention this particular case to point out that document examination is more than just signatures and typewriting.

If you have a suspicious document and consider utilizing a document examiner, here are some factors to consider:

1. Have the original questioned document available. If available, the original document will reveal more tell-tale signs of forgery or alteration than a copy. In some cases, such as a well executed simulated forgery, it may be imperative to have the original to draw any reasonable conclusions.

2. In suspected forgery cases, it is helpful to have known, unsolicited, samples of the victims writing that pre-date the questioned document. If, for example, the questioned writing is a signature on a contract dated January 1998, it would be helpful to have 20 canceled checks of the victim dated in late 1997. If there is a suspect forger, it is helpful to as much writing of that person as possible. The suspect may have a different name than the victim which does not include many similar letters or letter combinations; therefore unrelated handwritten documents/notes of the suspect may contain those letters needed for identification purposes.

3. If you need to solicit writing samples from an individual, i.e. either from a cooperative party or via a court order, it is important you follow certain guidelines so the solicited writings replicate the questioned document as closely as possible. For example, a similar type writing instrument plus the same size and format of the writing area on the questioned document should be utilized. A document examiner should be able to provide you with all of guidelines for obtaining solicited writings.

4. In cases involving documents in the possession of opposing counsel or the opposing party which will not be released, i.e., many medica1 negligence cases, the document examiner should be equipped to travel to the location of the documents and conduct a field examination.

The field of document examination is broadening with the advent of new computer technology. The volume of questioned document cases is not expected to decrease as technology increases. Remember, where there is a Will, there is a way. If you are interested in learning more about the field of questioned documents, I recommend *Scientific Examination of Questioned Documents* by Ordway Hilton and *Handwriting Identification* by Roy Huber. Also, I have a program intended for judges and lawyers that

has been approved in the past for three hours CLE credit.

Michael Robertson is a full-time document examiner based in **North** Canton, Ohio, and can be reached at **800.499.1287.**

RECENT CASES

Medical Malpractice – Statute of Limitations – Termination Rule

Wiggins v. Waltz, M.D., Cuy. Co. App. No. **74864.** September **30, 1999.** For Plaintiff/Appellant: Frank R. Desantis and Robin M. Wilson. For Defendant/Appellee: Steven J. Forbes. Opinion by Ann Dyke. James D. Sweeney and Michael J. Corrigan concur.

Plaintiff filed a medical malpractice action against her psychiatrist. The lawsuit was fded on December **23, 1996.** During **1995,** plaintiff was having problems with her **14** year old daughter. During October of **1995,** the defendant psychiatrist informed plaintiff that he needed to speak to the **14** year old daughter's counselor and that if he could not speak freely with the counselor he would no longer treat plaintiff. On October **26, 1995,** plaintiff did not appear for her scheduled appointment but, apparently, did telephone defendant psychiatrist and informed him that she could not give the defendant permission to talk freely with her daughter's counselor. The defendant informed plaintiff that if she did not make her appointment on October **27, 1995,** that her treatment was over. Plaintiff never returned to defendant's office. However, on November **1, 1995,** defendant psychiatrist sent plaintiff a letter to persuade her to return to treatment on defendant's own terms. The letter used analysis from past counseling sessions. The letter also requested payment for services rendered. Thereafter, defendant psychiatrist sent plaintiff several more letters requesting payment. These letters included analysis from plaintiffs treatment.

On April **25, 1996,** the Cleveland Psychoanalytical Society's ethics committee found that defendant psychiatrist had breached confidentiality by telling the counselor that plaintiff had terminated treatment and that plaintiff had accused him of breach of confidentiality. Moreover, the society found that defendant aggressively used threats and ultimatums to coerce plaintiff to return to treatment under defendant's terms.

The Trial Court granted defendant's Motion for Summary Judgment, ruling that plaintiffs complaint had not been fded within the applicable statute of limitations. The Court of Appeals affirmed holding that the physician/patient relationship terminated on October **27, 1995,** when plaintiffdid not appear at defendant's office despite the latter's ultimatum that he would no longer treat her should plaintiff not appear. The Court of Appeals was unpersuaded that the defendant psychiatrist's ongoing letters to the plaintiff which contmued to utilize psychiatric analysis obtained during the treatment sessions extended the physician-patient relationship.

EXPERT QUALIFICATION

Langford v. Dean, Cuy. Co. App. No. **74854.** September **30, 1999.** For Plaintiff/Appellant: Steven M. Weiss. For Defendant/Appellee: Margaret M. Gardner. Opinion by Michael **Corrigan. Ann** Dyke and James D. Sweeney concur.

Plaintiff sustained soft tissue neck and back injuries in a rear end automobile accident. Plaintiff had follow up treatment and physical therapy with her family doctor. The family doctor testified by way of videotape perpetuation of her testimony. Several days before trial plaintiff's counsel fded a transcript of the videotape deposition of the family physician and notified the Court that he intended to use the videotape deposition testimony in his case-in-chief.

The day before trial defendant fded a Motion for Directed Verdict arguing that the family doctor's testimony was inadequate as a matter of law to establish proximate cause because the family doctor had never opined as to the causal connection between the accident and the injuries. The defendant **also** contended in the motion that plaintiff had failed to elicit sufficient testimony to properly qualify the family doctor as an expert witness. Prior to jury selection the Trial Court granted the Motion for Directed Verdict. The Court of Appeals affirmed holding that the family doctor did not testify as to whether she was licensed in the State of Ohio or as to her educational background. Moreover, the Court of Appeals noted that there was no testimony regarding the family doctor's clinical or practical experience or whether she was board certified. The Court of Appeals was of the opinion that the connection between the soft tissue injury and the accident was not so apparent as to be a matter of common knowledge and therefore required expert testimony. Because plaintiff did not elicit testimony as *to* the family doctor's license, board certification, educational background and practical experience, the Court of Appeals ruled that the Trial Court did not abuse its discretion in finding that the family doctor had not been qualified as an expert witness.

SOVEREIGN IMMUNITY

Maxel vs. City of Cleveland Heights, Cuy. Co. App. No. 74851. September 30, 1999. For Plaintiff/Appellant: David J. Elk. For Defendant/Appellee: Denise B. Workum.

Plaintiff was injured when she was struck by a hockey puck while attending a hockey game at the Cleveland Heights Pavilion. Plaintiff was seated in the second row from the bottom of the pavilion's bleachers. Plaintiff retained a recreational safety expert who opined that commonly accepted safety standards for ice rinks were violated when the spectator area, includmg the bleachers, was raised to approximately 36 to 40 inches above the ground level. The expert opined that raising the entire area to such a height above ground level constituted a public nuisance. The expert further opined that the failure to protect spectators with safety nets constituted an additional significant hazard to the public. (The pavilion was equipped, however, with Plexiglas around its perimeter which extended to a height above head level of the spectators in the first two rows of the bleachers.) Defendant countered by stating that the decision as to where to place the netting and the height of the glass was made by the Recreation Department and the Public Works Department in accordance with commonly accepted safety and protective standards for ice rinks. The Court of Appeals affirmed the Trial Court's grant of summary judgment in favor of the City of Cleveland Heights. The Court of Appeals acknowledged that under the sovereign immunity statute the operation and control of a public stadium, auditorium, civic or social center, or exhibition hall is a proprietary function for which the City may be liable in negligence. However, the Court of Appeals found the hockey pavilion more akin to an indoor swimming pool or indoor recreational center which are classified as governmental functions under the sovereign immunity statute. Accordingly, the Court of Appeals held that plaintiffs claim was barred under the sovereign immunity statute because the placement of the bleachers, the glass, and the alleged fadure to provide sufficient netting are discretionary decisions made in connection with the construction and design of a building utilized for a governmental function.

Starling vs. MetroHealth Center Skilled **Nursing,** Cuy. *Co.* App. No. 75554. September 2, 1999. For Plaintiff/Appellee: Gary W. Kisling. For Defendant/Appellants: Marilyn Cassidy and Robert E. Matyjasik. Opinion by Ann Dyke. Ann Kilbane and Diane Karpinski concur.

The Court of Appeals affirmed the Trial Court's denial of the Motion for Judgment on the Pleadings

filed by the Cuyahoga County Board of Commissioners, the owners and operators of the MetroHealth Center Skilled Nursing Home. The Court of Appeals rejected the Board of Commissioners' argument that operation of the nursing home was a governmental function. Rather, the Court of Appeals held that since the nursing home services benefit only a segment of the population and a nursing home involves activities customarily engaged in by non-government employees, the nursing home could only be a governmental function if it fell under a category specifically designated a governmental function under R.C. 2744.01(C)(2)(m). Under that statutory subsection the Court of Appeals noted that the operation of a Human Services Department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent is indeed a governmental function. However, because the nursing home was controlled by the Board of County Commissioners and not the Department of Human Services and the Ohio Revised Code does not indicate that operation of a nursing home is a duty of the Department of Human Services, the operation of the nursing home could not be considered the same as the operation of a Human Services Department or agency. Accordingly, the Trial Court was correct in refusing to hold the operation of the nursing home a governmental function. The Court of Appeals went on to reason that even if the operation of the nursing home was a governmental function, the Board of County Commissioners may still be liable under R.C. 2744.02(B)(4) because that subsection provides that political subdivisions are not immune from liability to persons injured by the negligence of their employees and that occurs within or on the grounds of buildings used in connection with the performance of a governmental function. Thus, even if the operation of a nursing home were a governmental function, if the plaintiff could prove that the employees improperly set the temperature of the plaintiffs bath due to a physical defect of the water heating system, plaintiff could still prove a set of facts which would entitle her to relief.

Butler vs. Jordan, Cuy. Co. App. No. 74509. August 12, 1999. For Plaintiff/Appellant: William J. Novak and Thomas D. Robenalt. For Defendant/Appellee: William D. Mason. Opinion by James D. Sweeney. Terrence O'Donnell and Leo Spellacy concur.

Plaintiff filed suit against the Cuyahoga County Department of Human Services for the negligent and reckless conduct of an employee of a day care center home licensed by the Cuyahoga County Department of Human Services. The Trial Court granted defendant's Motion to Dismiss on the basis of sovereign immunity. The Court of Appeals reversed acknowledging that the day care center was in the furtherance of the operation of a Human Services Department or agency and, therefore, a governmental function. However, the Court of Appeals found the exception to sovereign immunity for governmental functions contained in R.C. 2744.02(B)(5) applicable so as to defeat immunity. This exception provides that a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code. The Court held that prior case law provides that where there is a mandatory duty, liability follows. Under R.C. 5104.11 a mandatory duty is imposed upon the Cuyahoga County Department of Human Services to inspect and license type B day-care homes. Accordingly, since R.C. 5104.11 imposes a mandatory duty the exception contained in R.C. 2744.02(B)(5) was applicable and the defendant was not entitled to sovereign immunity even though it had been engaged in a governmental function.

OPEN AND OBVIOUS DOCTRINE

Shepherd vs. Kap Realty, Cuy. Co. App. No. 75860. August 12, 1999. For Plaintiff/Appellant: Murray

Richelson. For Defendant/Appellee: Todd M. Haemmerle. Opinion by Ann Kilbane. John Patton and Patricia Blackman concur.

Plaintiff sustained a slip and fall as a result of stepping into a pothole in a poorly lit parking lot. Apparently, plaintiff was aware of the particular defect but because of the poor lighting conditions was unable to appreciate the pothole's presence. The Trial Court granted defendant's Motion for Summary Judgment on the basis that the defendant owed plainbffno duty of care inasmuch as the defect was "open and obvious". On appeal, plaintiff argued that the Supreme Court case of ***Texler vs. D.O.*** *Summers Cleaners & Shirt Laundry Co.,* (1998), **8** 1 Ohio St. 3d **677** was dispositive and rendered the question of whether the hole was open and obvious a jury question on the issue of comparative negligence. The Court of Appeals attempted to distinguish *Texler.* At any rate, the Court declined to follow the logical implication of ***Texler*** that whether a defect is open and obvious is a jury question on the issue of comparative negligence as opposed to an issue of law as to whether defendant owes plaintiffa duty of care in the first instance. Instead, the Court of Appeals departs from the majority of post ***Texler*** decisions and affirms the Trial Court's holding that where a defect is open and obvious the defendant cannot be negligent as a matter of law because no duty of care is owed by the defendant to a plaintiff for open and obvious defects.

VERDICTS & SETTLEMENTS

Jane Doe v. Phvsicians and Hospital

Type of Case: Medical Malpractice
Settlement: $3.5 Million
Plaintiff's Counsel: Kent B. Schneider
Defendant's Counsel: Withheld
Coun: Withheld
Date: July 1999
Insurance Company: Not Listed
Damages: Permanent Neurologic Injury

Summary: Plaintiff, a forty-seven year-old single woman, suffered from a neuroleptic malignant syndrome (NMS) from post-operative haldol administration rendering her bedridden and mute. NMS is a rare side effect from haldol causing fever which went undiagnosed post-operatively for two weeks. The delay in diagnosis caused permanent neurologic injury.

Plaintiff's Experts: Gerard Adonizio (NMS Psychiatric Expert); Gene Coppa (General Surgeon); Robert Cunnion (Intensivist); Robert Salata (Infectious Disease); Tarvez Tucker (Neurologist); Sharon Reavis (Life Care Planner)
Defendant's Experts: Fifteen (too numerous to mention)

Brittan DiSanto. et al. v. Beth Adams. et al.

Type of Case: Personal Injury
Verdict: $483,000 minus 45% comparative negligence resulting in net verdict of $265,500
Plaintiff's Counsel: Robert V. Housel, James Johnson Mark W. Ruf
Defendant's Counsel: Nick Fillo, Lynn Lazzaro
Court: Cuyahoga County Common Pleas, Judge Thomas J. Pokorny
Date: July 1999
Insurance Company: Allstate; State Farm; Metropolitan
Damages: $52,300 medical and lost wages

Summary: Plaintiff, Brittan DiSanto was leaving a supermarket in Westlake to go back to her car to go home with her father. As she left the supermarket to go to her car, an illegally parked van blocked her view of oncoming traffic. She proceeded cautiously towards the front of the van when Defendant Beth Adams came speeding around the van and turned

into her striking her in the leg. Defendant argued that Plaintiff, Brittan DiSanto, was completely responsible for her injuries. Obviously, the jury disagreed.

Plaintfs Experts: Dr. James Sferra (Orthopedic Surgery); Theodore White (Accident Reconstructionist)
Defendant's Experts: Not Listed

John Doe v. Defendantr

Type of Case: Products Liability
Settlement: **$1.6**Million
Plaintfs Counsel: Thomas Mester, Jeffrey Leikin
Defendant's Counsel: Richard McDonald, Michael Romanello, Mark McCarthy
Court: Cuyahoga County Common Pleas, Judge Eileen Gallagher
Date: August 1999
Insurance Company: Hartford/Self-Insured
Damages: Above-knee amputation and dislocated hip

Summary: Defendants collectively provided a fire tanker with defective brakes, an inadequate gear shift indicator, and improperly wired safety lights which incorrectly advised the operator that the vehicle was in neutral instead of drive, causing the tanker to inadvertently move forward striking Plaintiff. Defendant's primary defense was that chocks were not utilized by Plaint& or his fire depatment to prevent an inadvertent movement of the tanker. All experts agreed that chocks in conformity with the applicable standard would have prevented this incident.

Plaintiff's Experts: Simon Tamny; Roger Wilber, M.D.
Defendant's Experts: john Morello; Roger Newsock; Donald Blackmore

Jane Doe v. John Doe, M.D.

Type $Case: Medical Malpractice
Settlement: $900,000
Plaintiff's Counsel: William S. Jacobson, Lawrence W. Abramson
Defendant's Counsel: James Carpenter
Court: Franklin County, Judge Sheward
Date: August 1999
Insurance Company: Not Listed
Damages: Paralysis right hand; impairment right arm and right leg resulting in some spacicity.

Summary: Plaintiff went to the Defendant obstetrician inquiring about birth control. Plaintiff had Lupus which predisposes one to clotting. The Defendant prescribed Triphasil, an estrogen-based birth control pill, which also carries some risk for clotting. Approximately six weeks later Plaintiff threw a clot resulting in a stroke. Plaintiff argued that Triphasil was contraindicated in Lupus patients. The Defendant argued that it was not contraindicated and further argued that Plaintiff was negligent in disregarding the Defendant physician's instructions and the instructions that accompanied the medication to report any dizziness when she had had a fainting spell while driving a motor vehicle approximately two weeks prior to her stroke.

Plaintiff's Experts: Martin Gimovsky, M.D. (Obstetrician); George Munoz, M.D. (Rehumatologist); Paul Hudson, M.D. (Rheumatologist); Donald Mann, M.D. (Neurologist); James Klejka, M.D. (Physical Medicine & Rehabilitation); Rod Durgin, Ph.D. (Vocational); Norman Eckel, Ph.D. (Economist)
Defendant's Experts: Allan **B.** Kirsner, M.D. (Rheumatologist)

Jane Doe, Administratrix v. John Doe M.D., et al.

Type of Case: Medical Malpractice
Settlement: $500,000
Plaintiff's Counsel: William S. Jacobson
Defendant's Counsel: Kenneth Torgerson

Court: Cuyahoga County Common Pleas
Judge Thomas Matia/Frank Celebrezze, Jr.
Date: August **1999**
Insurance Company: Withheld
Damages: Death as a result of dehydration

Summary: This case was tried to a jury which was hung on the issue of proximate cause. Plaints had taken her 11 week old son to see the Defendant Pediatrician on a weekday morning with a few day history of vomiting and diarrhea. The physician examined the child and instructed the mother to return in three days if the chdd did not improve. He failed to give the mother any instructions regarding the signs and symptoms of dehydration. The following evening the parents went out to a bar and left the chdd with a 14 year old babysitter. When they returned the chdd was asleep and they went to bed as well. The following morning they woke to find the chdd had died of dehydration. The jury determined that the Defendant was negligent in failing to instruct the mother on the signs and symptoms of dehydration but could not agree on proximate cause. The Defendant had argued and presented the testimony of a Pediatric Pathologist to the effect that the death was not caused by dehydration. Additionally, the jury informed counsel that they were displeased with the child's parents for having gone out the night before the child died.

Plaintiff's Experts: Carol Miller, M.D. (Pediatrician)
Defendant's Experts: John Bucuvalas, M.D. (Pediatric Gastro/Intestinal Medicine); Kevin Bove, M.D. (Pediatric Patholog-ist)

Judy Varner, et al. v. Estate of David Lehtinen, M.D., et al.

Type of Case: Medical Malpractice
Vercict: $2,500,000
Plaintfs Counsel: Daniel Finelli, Ronald Margolis
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Judge David T. Matia
Dace: September **1999**
Insurance Company: PHICO
Damages: Permanent bowel incontinence and neurogenic bladder.

Summary: Plaintiff underwent lumbar laminectomy secondary to spinal stenosis performed by Defendant surgeon. Plaintiff alleged that slippage of the high speed drill caused avulsion of at least four sacral nerves and was substandard surgical technique. As a result, Plaintiff suffered permanent injuries; incontinence of bowel and neurogenic bladder. Defendants claim that Plaintiff's injuries were an acceptable complication of the procedure.

Plaintiff's Experts: Lawrence Marshall, M.D. (Neurology); Dennis Fried, M.D. (Colorectal Surgeon); Howard Goldman, M.D. (Urology); Dr. Thomas Boyd (Psychology)

Defendant's Experts: Benedict Colombi, M.D. (Neurosurgery)

Dhillon v. Lahood

Type of Case: Pedestrian/Auto Accident
Verdict: $11,125 (reduced by 35% comparative negligence
Plaintiff's Counsel: Kenneth J. Knabe
Defendant's Counsel: Nicholas Fillo
Court: Cuyahoga County Common Pleas
Date: July **1999**
Insurance Company: Allstate
Damages: Injuries to the head and shoulder

Summary: Defendant, a high school senior, struck Plaintiff, a 75-year old Eastern Indian gentleman, as he was attempting to walk across a private drive.

Plaintfs Experts: Dr. Brian Miller
Defendant's Experts: Not Listed.

Louis Venetti Executor of the Estate of Patricia Dolly v. Thomas Engstrom, et al.

Type of Case: Wrongful Death
Settlement: $150,000
Plaintiff's Counsel: Mark L. Wakefield
Defendant's Counsel: Harry Sigmier
Court: Trumbull County Common Pleas, Judge McKay
Date: May **1999**
Insurance Company: Royal Insurance Company
Damages: Death

Summary: Negligent maintenance by property owner of rental property, including negligent maintenanceof electrical outlets and wiring resulted in a fire causing Patricia Dolly's death.

Plaintiff's Experts: Churchwell Fire Consultants; Ralph Dolence
Defendant's Experts: Ralph Long; James Finneran

Mary Lou Safran v. Maritza Negron

Type of Case: PI - Auto/Bicycle Accident
Settlement: $100,000/$750,000
Plaintiff's Counsel: Gregory S. Scott
Defendant's Counsel: Withheld
Court: Withheld
Date: August **1999**
Insurance Company Electric Insurance

Summary: Plaintiff bicyclist was seriously injured when struck by vehicle driven by tortfeasor, who fell asleep at wheel. Plaintiff recovered past medicals of $200,000,plus $100,000in liability coverage from tortfeasor, then settled claim with Plaintiffs excess liability/UM carrier for $750,000.

Plaintiff's Experts: John Wilbur, M.D.
Defendant's Experts: Not Listed

The state of Jane Doe v. Dr. Smith, Dr. Jones & ABC Hospital

Type of Case: Wrongful Death
Settlement: $4,000,000
Plaintiff's Counsel: Charles Kampinski, Christopher M. Mellino, Laurel **A.** Matthews
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: September **1999**
insurance Company: Not Listed
Damages: Wrongful Death

Summary: Jane Doe was a 35-year-old wife and mother of three children. She was admitted to ABC Hospital in September **1996** under the care of Defendant, Dr. Smith. Jane Doe was 24 weeks pregnant, was bleeding and had signs and symptoms of a serious intrauterine infection. She had an ultrasound a few days earlier which showed a placenta previa, blocking the birth canal and preventing a vaginal delivery. However, the results of this ultrasound were never transmitted to Dr. Smith because ofa secretarial problem on the part of ABC Hospital.

Jane Doe had a second ultrasound following her admission. Dr. Smith received a call from the ultrasonography technician regarding those findings. Despite a markedly elevated white blood count on admission, Dr. Smith did not investigate whether she had an infection. In fact, Jane Doe had a severe infection, which resulted in her baby dying at approximately 2:00 a.m. the morning following her admission. Dr. Smith should have performed a Caesarean section, removed the baby and given appropriate antibiotics, especially since Jane had a history of three prior C-sections and an ultrasound demonstrating placenta previa. Instead, Dr. Smith attempted to induce labor so that the baby could be delivered vaginally later in the day. He then left the hospital and went home. Jane Doe's condition deteriorated. Her labor did not progress and the Infection spread throughout her body. Twelve hours

after the baby died she was taken to emergency surgery to remove the infected fetus and died on the operating room table.

Plaintiff's Experts: Stuart Edelberg, M.D. (Obstetrics/Gynecology); Lowell Young, M.D. (Infectious Diseases); John **F.** Burke, Jr., Ph.D. (Economist)
Defendant's Experts: Martin L. Gimovsky, M.D. (OB/GYN); David E. Soper, M.D. (OB/Infectious Diseases); Graham Ashmead, M.D. (OB/GYN); Richard L. Sweet, M.D. (OB/GYN); William J. Ledger, M.D. (OB/GYN); LeRoy Dierker, M.D. (OB/GYN); Joel S. Bennett, M.D. (Hematologist)

Mark Kreiter v. ABC Neurosurgery Center

Type of Case: Medical Malpractice
Settlement: $1,000,000
Plaintiff's Counsel: William Hawal
Defendant's Counsel: Thomas Treadon
Court: Not Listed
Judge Haas
Date: August **1999**
Insurance Company: Medical Protective
Damages: Bilateral drop foot

Summary: Plaints underwent routine lumbar laminectomy which was reported by the surgeon to have been uneventful. Following the surgery Plaintiff awoke with paraparesis. Plaintiff claims that he sustained an ischemic injury to the cauda equina due to excessive retraction. Defendant claimed that Plaintiff must have had an anomalous vascular supply to his spinal cord which allowed insignifcant instrumentation to cause injury.

Plaintfs Experts: Thomas Hanson, M.D. (Neurosurgeon)
Defendant's Experts: Gary L. Reas, M.D. (Neurosurgeon); Michael Devereaux, M.D. (Neurologist)

The Estate of Jane Doe v Dr Roe. et al

Type of Case: Medical Malpractice
Settlement: $1,200,000
Plaintiff's Counsel: Debra J. Dixon
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: June **1999**
Insurance Company: CNA
Damages: Wrongful Death

Summary: Plaintiffs decedent (age **72)** underwent lysis of pelvic adhesions. During the procedure two enterotomies were created and went undetected. **As** a result, Plaintiff's decedent developed sepsis, peritonitis, multisystem organ failure, and ultimately death.

Plaintiff's Expens: Walter Ruf, M.D.
Defendant's Experts: Withheld

Jane Doe v ABC Nursina Home

Type of Case: Nursing Home Bill of Rights Violation(s)
Settlement: $250,000
Plaintfs Counsel: Debra Dixon
Defendant's Counsel: Scott Smith
Court: Medina County Common Pleas
Judge Kimbler
Date: December 1998
Insurance Company: Self-Insured
Damages: Fractured hip, bowel obstruction/ perforation.

Summary: While a resident at Defendant, ABC Nursing Home, Plaintiff sustained a perforated bowel as a result of an undetected obstruction. After Plaintiff's return to the Defendant's facility, she was left unattended and unrestrained as per physician's and family's instructions and fell from her wheelchair sustaining a hip fracture.

Plaintiff's Experts: Leonard Williams, M.D. (Geriatric Physician)

Defendant's Experts: Not Listed

John Doe et al. v. XYZ Nursing Home

Type of Case: Nursing Home Bill of Rights Violation
Settlement: $70,000
Plaintiff's Counsel: Debra Dixon
Defendant's Counsel: Withheld
Court: Cuyahoga County
Date: December 1998
Insurance Company: Not Listed
Damages: Trauma to eye and elevated agitation.

Summary: Plaints was a resident in Defendant's nursing home where he was a victim of multiple medication errors and a physical assault by a nurse charged with his care.

Plaintfs Experts: Leonard Williams, M.D. (Geriatric Pharmacology)
Defendant's Experts: Dr. Frankel (Geriatric Psychiatry)

Augustine, et al. v. Sears, Roebuck, et al.

Type of Case: Products Liability
Settlement: Confidential
Plaintfs Counsel: Debra Dixon, Jim Deese
Defendant's Counsel: Withheld
Court: Magistrate Patricia Hemann
Date: April 1999
Insurance Company Liberty Mutual
Damages: Shattered patilla

Summary: Plaintiff was a first- time user of a new home treadmill. Within the first two minutes of use, the unit sped out of control throwing her from the machine onto the cement floor.

Plaintfs Experts: Ken Loughery, Ph.D. (Human Factors); Ken Loparo, Ph.D. (Systems and Control Engineering
Defendant's Experts: Laurel Jenson (Engineering); Edward Caufield, Ph.D. (Human Factors and Engineering)

Caption Withheld

Type of Case: Medical Malpractice
Settlement: $350,000
Plaintiff's Counsel: Peter **H.** Weinberger
Defendant's Counsel: Withheld
Court: Ashland County
Date: August 1999
Insurance Company: Medical Protective
Damages: Erb's palsy

Summary: Shoulder dystocia leading to Erb's palsy. Defendant claimed he had performed McRobert's maneuver, but injury was not preventable. Prenatal care and workup was done appropriately. Baby was not macrosomic. Claim was based upon excessive use of traction on head.

Plaintfs Experts: James O'Leary, M.D.; David Rothner, M.D.
Defendant's Experts: Davis Baldwin, M.D.

Hunt v. Pavlak

Type of Case: Bicycle/Car Accident
Settlement: $250,000
Plaintiff's Counsel: Peter H. Weinberger, Stuart E. Scott
Defendant's Counsel: Tim Welsh
Court: Mahoning County
Insurance Company: Westfield
Damages: Head injury

Summary: Plaints, 11 years old, rode bicycle and turned left in front of oncoming vehicle on residential street. Plaintiff claimed that Defendant failed to keep proper look out and that his comparative negligence did not exceed the negligence of Defendant driver.

Plaintfs ***Experts:*** Hank Lipian; John Conomy, M.D.; David Rothner, M.D.
Defendant's Experts: Not Listed

Caption Withheld

Type $Case: Medical Malpractice
Settlement: $250,000
Plaintiff's Counsel: Peter H. Weinberger
Defendant's Counsel: Withheld
Court: Medina County
Date: July 1999
Insurance Company: **OIGA**
Damages: Pancreatitis leading to insulin depended diabetes

Summary: Plaintiff underwent ERCP for presumed bile duct stone which resulted in exacerbated pancreatitis and pancreatic psuedocyst and removal of part of pancreas.

Piaintfs Experts: Robert Goldstein, M.D.
Defendant's Experts: John Marshall, M.D.; Khaled Issa, M.D.

Stacey Hairston v. The Cleveland Browns nka Baltimore Ravens, Inc.

Type of Case: Intentional Tort (Failure io pay awarded Workers' Compensation)
Settlement: Confidential
Plaintiff's Counsel: Dennis P. Mulvihill, Mark L. Wakefield
Defendant's Counsel: Anthony DiVenere, Dan Makee
Court: Cuyahoga County
Date: May 1999
Insurance Company: Self-Insured
Damages: Denial of wage loss benefits

Summary: Plaintiff, a cornerback during the 1995 season for Defendant Cleveland Browns, sustained a career-ending injury. Plaintiff was awarded Workers' Compensation wage loss benefits which Defendant intentionally failed to pay.

Plaintiff's Experts: Thomas Greve, Esq.; Raymond Tesner, D.O.
Defendant's Experts: Tim Marcovy, Esq.

John Doe v. John Doe. M.D and John [redacted] Hospital

Type of Case: Medical Malpractice
Settlement: $600,000
Plaintiff's Counsel: Thomas Mester, Maurice L. Heller
Defendant's Counsel: Colleen Petrello, Ken Torgerson
Court: Cuyahoga County
Judge Frank Celebrezze
Date: October **1999**
Insurance Company: Hospital - Self Insured; Other insurance company - Withheld
Damages: Testicular cancer resulting in death

Summary: Plaintiff presented with groin pain to the emergency room which was treated for epididymitis. he was told to follow up with his personal physician and he failed to do so. Subsequently, one and one-half years later he complained of back and abdominal pain to his personal physician and subsequently went to an urgen care on two occasions with similar complaints. It is noteworthy that the complaints did not include testicular pain or pain in the groin. He was subsequently diagnosed two years after his initial emergency room visit with testicular cancer and was advised it was end stage for whch he succumbed. The defense was that he did not have signs of testicular cancer and a diagnosis could not be made until it was too late to effect the outcome. Defendant's position was supported by the fact that even at the time his diagnosis was ultimately made, urologists examining him failed to diagnose that he had testicular cancer until more sophisticated testing ultimately diagnosed his condition. Further, Defendants contended that had Plaintiff had testicular cancer in the initial visit, he probably would not have survived to the time of his visits to the urgent care one and one-half years later.

Plaintiff's Experts: Barry Singer, M.D. (Oncologist); Frank Baker, M.D. (ER Physician)
Defendant's Experts: Thomas Dell, M.D. (Internist); Charles Emerman, M.D. (ER Physician); Daniel T. Schelble, M.D. (ER Physician);

Bruce Braken, M.D. **(Urologist)**

Jane Doe v. Dr. Roe

Type of Case: Medical Malpractice
Settlement: $265,000
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: Withheld
Court: Ashtabula County
Judge Mackey
Date: September **1999**
Insurance Company: **OIGA**
Damages: Mastectomy

Summary: In February **1994,** Plaintiffs surgeon evaluated a lump in her left breast. Mammogram was normal and needle biopsy showed "atypia". The **6** month evaluation was normal according to Defendant but the patient claimed the lump was still present and painful. In January **1995,** Plaintiff was diagnosed with Stage III **A** metastatic breast cancer. Plaintiff claimed that the 11 month delay resulted in the cancer progressing from a curable stage to an incurable stage.

Plaintfs *Experts:* David Beffler; Martin Lee; Samuel Kremen
Defendant's Experts: Carl Groppe, Jr., M.D.; James Fanning, D.O.; Anthony Bacevice, M.D.; Benjamin Reichstein, M.D.

Jane Doe Adm. v. ABC Hospital

Type of Case: Wrongful Death
Settlement: $1,837,500
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: Withheld
Court: Cuyahoga County
Judge Dan Corrigan
Date: October **1999**
Insurance Company: Withheld
Damages: Wrongful death

Summary: Decedent **was** a laborer on a work site when a tortfeasor backed his truck pinning him against other equipment. That tortfeasor previously settled for **$950,000.** Decedent was taken to a local trauma center where his abdominal injuries were evaluated. The fvst DPL was normal but decedent continued to become unstable and hypotensive. Eight hours later, he went into cardiac arrest at which time a second DPL was positive and exploratory laparotomy showed diaphragmatic tear, lacerated spleen and mesenteric hematoma.

Plaintfs Experts: Wendy Marshall, M.D.; John Burke, Jr., Ph.D.
Defendant's Experts: None

Michael Willis v. Marymount Hospital, et al.

Type of Case: Medical Malpractice
Settlement: $150,000
Plaintiff's Counsel: Claudia R. Eklund
Defendant's Counsel: Doug Leak
Court: Cuyahoga County Common Pleas
Judge Jose Villanueva
Insurance Company: OIGA
Damages: Ruptured appendix

Summary: Emergency room physician failed to diagnose appendicitis and discharged patient. Patient returned following day. Appendix had ruptured. Open procedure required with ten day hospital stay.

Plaintfs Experts: Dr. Linda Herman
Defendant's Experts: Dr. Bruce Janiak

Nabila Bastawros v. Charles C. Shin, M.D. et al.

Type of Case: Medical Malpractice
Settlement: $100,000
Plaintfs Counsel: Claudia R. Eklund
Defendant's Counsel: Dennis R. Fogarty
Court: Cuyahoga County Common Pleas
Judge Calabrese
Date: May **1999**
Insurance Company: **OIGA**

Damages: Revision of knee replacement.

Summary: Total knee replacement -- improperly placed, requiring revisional surgery.

Plaintfs Experts: Dr. Andrew Roth
Defendant's Experts: Dr. Alan Wilde

Mary Sol Carrasquillo, etc v. General Motors Coro., et al.

Type of Case: Civil -- Products Liability
Verdict: $1.5 million
Plaintiff's Counsel: Claudia R. Eklund
Defendant's Counsel: Tom Davis
Court: Cuyahoga County Common Pleas
Judge Villanueva
Date: August 1999
lnsurance Company: Self-Insured
Damages: Wrongful death of 36-year-old man.

Summary: The decedent was employed by Waste Management as a driver of a refuse truck. At the time of the occurrence he was a passenger in a duel drive, rear hinged truck whch had an unprotected door handle. While in transit going at a rate of **30** mph, the decedent, for reasons unknown, opened the door and in an attempt to keep the door closed was pulled from the vehicle and crushed under the wheels of the truck.

Plaintiff's Experts: Simon Tamny
Defendant's Experts: Dennis Guenther

John Doe v. John Doe Hospital, et al.

Type of Case: Medical Malpractice
Settlement: $900,000
Plaintfs Counsel: R. Eric Kennedy
Defendant's Counsel: Anna Carulas; Stephen Walters
Court: Cuyahoga County
Judge Stuart Friedman
Date: September 1999
Insurance Company: Not Listed

Damages: Death

Summary: Defendants failed to timely treat post-operative (hysterectomy) complication of bowel perforation.

Plaintiff's Experts: Stephen Metz, M.D. (Obstetrician)
Defendant's Experts: Not Listed

Herman Reagan v. State Auto Insurance

Type of Case: Underinsured, Failure to Yield Auto Case
Verdict: $172,660 plus $6,000+
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: Stephen J. Proe
Court: Stark County Common Pleas
Date: August 1999
Insurance Company: Progressive (wrong doer's ins. co.); State Auto (underinsured coverage for Pltf.)
Damages: Soft tissue injuries to neck and upper back, headaches -- resulted in chronic pain

Summary: Wrong doer ran a stop sign and Plaintiff's car ran into the side of his car with an impact at 50 mph. Wrong doer's insurance company paid policy limits of $25,000. Plaintiff sued his own insurance company, State Auto.

Plaintiff's Experts: Dr. Colombi; Dr. Khanna
Defendant's Experts: Dr. Surridge; Dr. Morris

Patricia Provenzano v. Patricia Smerk

Type of Case: Personal Injury/Auto Accident
Settlement: $210,000
Plaintiff's Counsel: Joseph C. Domiano; Kevin L. Lenson
Defendant's Counsel: William Vance; Les Chambers
Court: Cuyahoga County Common Pleas,
Judge Frank Celebrezze, Jr.
Date: August 1999
Insurance Company: Westfield; Celina Group

Damages: In excess of $50,000 in medical bills

Summary: The matter stemmed from a *six* automobile chain accident on SOM Center Road in Solon. Plaintiff was operating the 4th vehicle and was struck from behind by Defendant, James Meade, who was operating a large truck. Meade claimed that he was pushed into the Plaintiff by Defendant Smerk's vehicle, who had struck his truck in the rear. Plaintiff sustained a herniated cervicle disc, requiring fusion surgery.

Plaintiff's Experts: Michael Eppig, M.D.
Defendant's Experts: Timothy Gordan, M.D.

Mary T. Fratoe v. Elias Bros Restaurants. inc.. et al.

Type of Case: Premises Liability -- Slip-and-Fall on Ice
Verdict: $205,000 (settlement of $25,000 by two Defs. after first day of trial)
Plaintiff's Counsel: Henry W. Chamberlain
Defendant's Counsel: Gary Weiss
Court: Cuyahoga County
Judge James J. Sweeney
Date: October 1999
Insurance Company: CHUBB Services Corp.
Damages: Compound and comminuted fracture of distal left femur requiring surgical repair and placement of a rod and ten screws (knee/femur).

Summary: Plaintiff slipped on ice which had formed beneath an awning near the entrance to an Elias Bros. Restaurant. The jury found the Plaintiff was 27% negligence and Defendants were 73% negligent. Two Defendants (responsible for exterior maintenance of the strip mall where the restaurant was located) settled for $25,000 on the first day of trial. Counsel for Plaintiff asked for $190,000 during clising argument; the jury awarded $205,000.

Plaintiff's Experts: Raymond Horwood, M.D.
(Orthopedic Surgeon)
Defendant's Experts: Not Listed

Jane Doe v Nursina Home

Type of Case: Nursing Home Negligence
Settlement: $375,000
Plaintiff's Counsel: Peter J. Brodhead; Mary Cavanaugh
Defendant's Counsel: Withheld
Court: Not Listed
Date: September, 1999
Insurance Company: Not Listed
Damages: Fractures of femur, tibia and fibula; resulting death from fat emboli

Summary: Certified nursing assistant dropped resident while trying to move her into chair without assistance and contrary to doctor's order for two person assist; multiple fractures, fat emboli leading to death.

Plaintiff's Experts: Dr. Edwin Season (Orthopedics); Annette Dever, **R.N.**
Defendant's Experts: Allan Rosenfield, M.D. (Geriatrics)

Doe v. Doe

Type of Case: Motor Vehicle Accident
Settlement: $50,000
Plaintiff's Counsel: Debra Dixon
Defendant's Counsel: Not Listed
Court: Not Listed (Claims only)
Date: January, 1999
Insurance Company: Westfield
Damages: Cervical strain; medical expenses of $4,000

Summary: Auto accident; rear-ender

Plaintiff's Experts: Dr. Patel
Defendant's Experts: Not Listed

CATA VERDICTS AND SETTLEMENTS

CASE CAPTION: _____

TYPE OF CASE: _____

VERDICT: _____ **SETTLEMENT:** _____

COUNSEL FOR PLAINTIFF(S): _____
Address: _____
Telephone: _____

COUNSEL FOR DEFENDANT(S): _____

COURT/JUDGE/CASE N O _____

DATE OF SETTLEMENT/VERDICT: _____

INSURANCE COMPANY: _____

DAMAGES: _____

BRIEF SUMMARY OF THE CASE: _____

_____

_____

_____

_____

EXPERTS FOR PLAINTIFF(S): _____

_____

_____

EXPERTS FOR DEFENDANT(S): _____

_____

_____

RETURN FORM TO:

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Fax: (216) 781-1030

APPLICATION FOR MEMBERSHIP

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below, and submit the requested information in support of my application. I understand that my application must be seconded by a member of the Academy and approved by the President. If elected a member of the Academy, I agree to abide by its Constitution and By-Laws and ***participate fully*** in ***the program of the Academy.*** I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. **Skill, interest and ability in trial and appellate practice.**

2. **Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.**

3. **Excellent character and integrity *of* the highest order.**

In addition, I certify that no more that 25% of my practice and that of my firm's practice if I am not a sole practitioner, ***is*** devoted to personal injury litigation defense.

NAME_____ AGE:_____

FIRM NAME:_____

OFFICE ADDRESS:_____ PHONE NO:_____

HOME ADDRESS:_____ PHONE NO:_____

SPOUSE'S NAME:_____ NO. OF CHILDREN:_____

SCHOOLS ATTENDED AND DEGREES (GIVE DATES):_____

_____

PROFESSIONAL HONORS OR ARTICLES WRITTEN:_____

_____

DATE OF ADMISSION TO OHIO BAR:_____ DATE COMMENCED PRACTICE:_____

PERCENTAGE OF CASES REPRESENTING CLAIMANTS:_____

DO YOU DO 25% OR MORE PERSONAL INJURY DEFENSE:_____

NAMES OF PARTNERS, ASSOCIATES AND/OR OFFICE ASSOCIATES (STATE WHICH):_____

_____

MEMBERSHIP IN LEGAL ASSOCIATIONS (BAR, FRATERNITY, ETC.):_____

_____

DATE:_____ APPLICANT:_____

INVITED BY:_____ SECONDED BY:_____

PRESIDENT'S APPROVAL:_____ DATE:_____

THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS

"ACCESS TO EXCELLENCE"

The Cleveland Academy of Trial Attorneys is one of Ohio's premier trial lawyers organizations. The Academy is dedicated to excellence in education and access to information that will assist members who represent plaintiffs in the areas of personal injury, medical malpractice and product liability law. Benefits of academy membership include **access to:**

1. **THE EXPERT REPORT, DEPOSITION BANK AND THE BRIEF BANK** a huge collection of reports and depositions of experts routmely used by the defense bar, and detailed briefs concernmg key issues encountered in the personal injury practice.

2. **THE ACADEMY NEWSLETTER:** published *six* times a year, contains summaries of significant unreported cases from the Cuyahoga County Court of Appeals. Also contains recent verdict and settlement reports.

3. **LUNCHEON SEMINARS:** C.L.E. accredited luncheon seminars, about *six* per year, includes presentations by experienced lawyers, judges and expert witnesses on trial strategy and current litigation topics. These lunches also provide networking access with other lawyers, experts and judges.

4. **THE BERNARD FRIEDMAN LITIGATION SEMINAR** this annual all day C.L.E. seminar has featured lecture styled presentations and mock trial demonstrations with a focus group jury. Guest speakers usually include a judge from the Ohio Supreme Court.

5. **ACADEMY SPONSORED SOCIAL AND CHARITABLE EVENTS:** these mclude the annual mstallation dmner, the golf outmg, and the holiday no dmner dance which supports the hunger programs in Cuyahoga County. These events are routmely attended by members of the academy and judges from Cuyahoga County Common Pleas Court, the Eighth District Court of Appeals, U.S. District Court and the Ohio Supreme Court.

THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
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